Supreme Court, U.S.
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No. ———

In The
Supreme Court of the United States

IKECHUKWU UMEUGO,
Petitioner,

v.

BARDEN CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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April 20, 2009

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QUESTION(S) PRESENTED FOR REVIEW

1) Whether, it is a Sanctionable Conduct or Bad Faith Litigation Conduct pursuant to Inherent Power of the Court for an Attorney to request the District Court to consider Attorney's Fees and Costs per Client's instruction in an Amended Complaint and/or during Settlement Conference?

2) Whether the United States Court of Appeals for the Second Circuit was incorrect or in error in affirming or concluding that Attorney Umeugo by including and/or Requesting for Attorney's Fees and Costs in Court Approved Leave to Amend Complaint and or during Court Settlement Conference in regards to water usage claim was a groundless procedural step and thus Sanctionable Conduct or Bad Faith Litigation Conduct?

3) Whether the United States Court of Appeals for the 2nd Cir. was incorrect or in error when it affirmed in part the District Court Award of Attorney's Fees and Expenses or Costs, that was not supported with clear, direct credible or competent evidence?

LIST OF PARTIES

The Parties to the proceeding in the court whose judgment is sought to be reviewed include the following:

1) Attorney Ikechukwu Umeugo, Petitioner herein, Interested-Party/Appellant below.

2) Ralph Bello and Vera Associates Limited Partnership, Plaintiffs below.

2) Barden Corporation, Respondent herein, Defendant/Appellee below.

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The opinion of the United States Court of Appeals for the Second Circuit (App. 1a-10a) is unofficially reported at 2009 U.S. App. LEXIS 1086 (2d Cir. Jan. 21, 2009). The memorandum opinion and order of the United States District Court of the District of Connecticut (App. 11a-42a) is unpublished, but unofficially reported at 2006 WL 2827091, 2006 U.S. Dist. Lexis 71385 (D. Conn. Sept. 29, 2006)

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I Background Facts and Issues:

Plaintiffs filed complaints in Connecticut Superior Court arising as a result of waste oil/hazardous materials brought, supplied and delivered by a number of Defendants (including Barden Corporation) brought onto Plaintiffs' property which later spilled, resulting in an EPA clean up of the site at a cost in excess of $1.1 million. However, Barden Corporation [herein after "Barden"] was not a party to the State Court action. Plaintiffs made an attempt to resolve the matter with some Defendants.

The Connecticut Superior Court decided to characterize the cases as complex litigation and referred it to the Trial Judge for resolution by way of Trial or Settlement. During the course of the litigation,

some of the Defendants filed a Motion to Revise and Plaintiffs filed a Request to Amend. Some of the Defendants requested that the case be moved to the Federal District Court. It was Plaintiffs' understanding that on June 29, 2001, the presiding Judge, as discussed in a prior Status Conference with all of the parties, requested that one operating revised Complaint be developed to avoid multiple revised Complaints. For some reason, the Trial Judge changed his position and granted a Motion for Non-Suit in regards to some of the Defendants, but at the same time, the Judge gave Plaintiffs four months to revise the Complaint and that the Non-Suit would be set aside. However, Plaintiffs decided to refile the entire case in Federal District Court where all of the issues should be addressed under Federal Law and State Common Law to recover damages. There was never a finding of bad faith in the State Superior Court and the Complaints filed in District Court were not identical.

Barden filed its Motion to Dismiss the entire Plaintiffs' claims under FRCP 12(b)(6) on October 2, 2001. The Plaintiffs filed their Objection to this Motion on or about November 9, 2001 (see U.S. Court of Appeals App. 259). Barden filed its Reply Brief on November 15, 2001 and the Court granted Barden's Motion with prejudice as to all of the Plaintiffs' original claims on January 7, 2002. The Court also granted the Plaintiffs Leave to Amend their Complaint to bring a claim for water usage fees in the amount of $900.37 by means of its January 7, 2002 decision.

Following the Court's January 7, 2002 ruling, Barden made an offer to resolve the matter for $900.37 with a threat that if Plaintiffs did not take the

settlement, Barden would file a Motion for Sanctions designed specifically to force the Plaintiffs to settle without considering their option for Appeal and Motion for Reconsideration. In compliance with the Court order, Plaintiffs filed an Amended Complaint. The Court held a conference on January 16, 2002 to address possible resolution of the matter. A settlement conference was scheduled by the court with Judge Martinez, to take place on February 8, 2002 (see District Court docket sheet, App. 1).

Barden filed a second Motion to Dismiss based upon a lack of subject matter jurisdiction in regards to the Plaintiffs' remaining water usage claim of $900.37; however, the Court did not rule on the Motion to Dismiss. During a status conference on January 24, 2002, Plaintiffs decided to accept Barden's prior offer of $900.37; (see U.S. Court of Appeals 2nd Cir. App. 314); however, Barden withdrew the offer. (See District Court Transcript dated January 24, 2008, p.6. lines 17-19, U.S. Court of Appeals 2nd Cir. App. 26). After the Court pointed out to Barden's Counsel that he could not guarantee that the Plaintiffs would not be successful on appeal, Barden's Counsel renewed the offer to settle. (U.S. Court of Appeals 2nd Cir. app. 26 p. 8 lines 1-7). The Plaintiff after considering their options to either appeal or settle, decided to accept the offer to settle the case for $900.37. All of the Plaintiffs' remaining actions against all other Defendants which were then pending before the Court were dismissed. Barden had served written notice of its intent to seek the recovery of its attorney's fees and costs as to Attorney Umeugo (and the imposition of sanctions on the Plaintiffs) on the Plaintiffs and their counsel on January 22, 2002.

II Decision of the District Court

On September 29, 2006, approximately about four years and eight months after Barden filed its' Motion for Sanctions, the District Court granted the said Barden's Motion for Sanctions (see U.S. Court of Appeals 2nd Cir., App. 71). On October 27, 2006, Attorney Umeugo filed his Notice of Appeal (see U.S. Court of Appeals 2nd Cir. App. 9). The Appeal was still pending before the U.S. Appellate Court, 2nd Cir., when the District Court made a decision on the Barden Corporation's application for Attorneys fees approximately ten months after the said Motion was filed by Barden (see U.S. Court of Appeals 2nd Cir. App. 198). Thereafter, Barden filed with the District Court a Motion for Clarification of the Court's order on the basis the District Court's "apparent inconsistency", between the allocation of sanctions in the said decision (Barden's Motion for Clarification of order, U.S. Court of Appeals 2nd Cir. App. 204).

One year later, on September 28, 2007, the Court awarded sanctions against Attorney Umeugo and his clients jointly in the amount of $67,192.00 constitution $54,606 in Barden's fees incurred and sought in litigation of its Motion to Dismiss, and $12,588.00 in Barden's expenses incurred throughout the litigation. The Court awarded an additional $32,762.00 against Attorney Umeugo constituting a portion of Barden's fees incurred and sought in connection with its Motion for Sanctions. (App. 4a)

III Decision(s) of The United States Court of Appeals 2nd Cir.

On May 21, 2008, a panel of the U.S. Court of Appeals for the 2nd Cir. concluded that Attorney Umeugo's appeal was not frivolous and denied Barden's Motion to Dismiss the Appeal (App. 9a)

On January 21, 2009, the Appellate Court held that the record does not establish that Attorney Umeugo engaged in any Bad Faith Conduct prior to January 7, 2002 or in connection with that Motion (Barden's Motion to Dismiss), thus the Appellate Court affirmed in part and vacated in part the Judgment of the District Court to Sanction (App. 7a)

The United States Court of Appeals for the 2nd Cir. further held that, "the District Court faults Attorney Umeugo for having brought multiple lawsuits against multiple Defendants instead of suing all Defendants together in one suit. Bello, 2006 WL 2827091, at *11, 2006 U.S. Dist. Lexis 71385, at *30." However, the Appellate Court held that a Plaintiff has the right to file potentially meritorious lawsuits in the form that he chooses. Cf. Sussman v. Bank of Israel, 56 F.3d 450, 457 (2d Cir.) cert. denied, 516 U.S. 916 (1995) ("Attorneys are not under affirmative obligation to file an action in the most convenient forum; their only obligation is to file in a proper forum."(Internal quotation marks omitted))".

The United States Court of Appeals for the 2nd Cir. also held in its decision that the District Court also faults Attorney Umeugo for filing claims in Federal Court "while never articulating a theory as to why the claim was not frivolous." Bello, 2006 WL 2827091, at

*21, 2006 U.S. Dist. Lexis 71385, at *34. The Appellate Court held that it is Barden's burden to demonstrate that the claim was frivolous, not Attorney Umeugo to demonstrate that it was not. Nor does the District Court point to evidence in the record demonstrating that Attorney Umeugo actually believed that he was asserting meritless claims. Although the District Court ultimately concluded that the two claims asserted by the Plaintiffs in their initial complaint—one for damages under CERCLA and the other for damages under Connecticut Tort Law—were without merit that is of course an insufficient ground for the imposition of sanctions. The District Court observed, it could not "guarantee that [Umeugo] wouldn't be successful on appeal, "a statement which we read as in tension with the conclusion that the claim was transparently meritless. Indeed, Umeugo's ultimate strategy was successful in part – he was able to secure relief, however modest, for his clients pursuant to CERCLA.

The Appellate Court further held that

> while, as noted we affirm the Sanctions Judgment in part; we cannot affirm it in its entirety because it far exceeds the expenses reasonably incurred by Barden to meet Attorney Umeugo groundless, bad faith procedural moves. Barden is entitled only to costs and fees relating to Attorney Umeugo's sanctionable conduct that is relating to Attorney Umeugo conduct in connection with the water-usage claim and not to costs or fees incurred prior to the District Court's January 7, 2002 opinion dismissing the original Complaint in its entirety. Therefore, we vacate the District Court's award of $54,606.00 in fees incurred

> and awarded in connection with the Motion to Dismiss. We also vacate in toto the $12,588.00 in expenses incurred by Barden throughout the litigation including in connection with its Motion to Dismiss under the circumstances, the amount of the award that we affirmed, $32,762.00, is more that sufficient to compensate Barden for its costs reasonably incurred to meet Attorney Umeugo's groundless procedural steps that he took in bad faith.

The Appellate Court further stated "Although the District Court did not abuse its discretion in concluding that Attorney Umeugo acted in bad faith by attempting to settle the water-usage claim, we are nonetheless concerned about the amount that Barden's counsel, Carmody & Torrence LLP has sought for costs and expenses after the District Court's January 7, 2002 opinion more than $84,519.00. On January 22, 2002, Attorney Umeugo offered to settle the case for $2,900.37, constituting the full amount of the water-usage claim and $2,000.00 in Attorney's Fees. The District Court did not err in concluding that Attorney Umeugo improperly sought to extract more than the full outstanding value of the claim. We note nonetheless that Barden could have settled the case in full for approximately $81,000.00 less than it actually spent in declining the offer and seeking sanctions before the District Court, thereby preventing an appeal on this issue and its related costs."

In the period between January 16, 2002, and January 24, 2002, the time when the case was settled in full, Barden spent approximately $20,000.00 in fees. In addition; Barden spent more than $57,000.00 in connection with the sanctions motion all the while

knowing that it would seek to have those costs and fees imposed upon Attorney Umeugo. Although we might question the propriety of Barden's actions (App. 9a).

REASONS FOR GRANTING THE PETITION

Attorney Umeugo respectfully submits that there are five reasons why this Court should grant his Petition for Writ of Certiorari and review the 2nd Cir.'s decision. First, as generally known, the U.S. Supreme Court has not defined what constitutes bad faith litigation standards conduct, as a result the Courts are all over the water front as to bad faith litigation standards or what standards to apply. Second, requesting for attorney's fees and costs per client's instruction as a relief sought in an Amended Complaint and/or during Settlement Conference, which generally can either be granted or denied is not a sanctionable conduct or bad faith litigation conduct as suggested in Chambers v. Nasco, Inc., 501 U.S. 32 (1991). Thirdly, the 2nd Cir. rulings hinges upon the important question of Federal Rules of Practice that has not been, but should be settled by the Supreme Court; namely is it a sanctionable conduct or bad faith litigation conduct for an attorney to request the District Court to consider attorney's fees and costs per the client's instruction in an Amended Complaint and/or during Settlement Conference. The Supreme Court's decision on this issue will affect all lawyers that practice in the Federal Courts. Fourthly, the District Court's decision to sanction which was affirmed in part by the 2nd Cir. was based on erroneous view of the law or the assessment of the evidence as articulated in Sussman v. Bank of Israel, 56 F.3d 450, 456 (2d Cir.) cert. denied, 516 U.S. 916

(1995), and thus an abuse of District Court discretion and such decision should be reversed. Fifthly, since there is no clear, direct, credible or competent evidence to support the District Court's decision to sanction, which was affirmed in part by the U.S. Court of Appeals, its award of attorney's fees and expenses or costs was in error or abuse of discretion.

I Definition of What Constitutes Bad Faith Litigation Conduct is Needed

The District Court made it very clear in its decision to sanction that the said decision was made solely pursuant to its' inherent power (see Court's decision to Sanction App. 31a). The Courts are always admonished that inherent powers must be exercised "**with great caution**". Ex parte Burr, 22 U.S. (9 Wheat.) 529 (1824).

The discretional power or authority of the District Court to invoke its inherent power does not preclude litigants including Attorney Umeugo from challenging the basis of such ruling on sanction or requesting the Appellate Court via appeal to correct a District Court's legal errors. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402-409 (1990).

A genuine and careful review of the facts, the evidence, the records and the reasons given by the District Court to sanction will prove or show that Attorney Umeugo did not engage in any bad faith litigation conduct, improper conduct, or harassment and he did not disobey the authority or order of the District Court.

Further, in regards to the exercise of "inherent power", the 2nd Cir. has interpreted the standard restrictively, stating:

> To ensure, however, that the fear of an award of Attorney's fees against them will not deter person with colorable claims from pursuing those claims, we have declined to uphold awards under the bad faith exception absent both "clear evidence" that the challenged actions are entirely without color and are taken for reasons of harassment or delay or other improper purposes, and a high degree of specificity in the factual findings of the lower courts.

See Dow Chem. Pac. Ltd. vs. Rascator Mar. S.A., 782 F.2d 329, 344 (2d Cir. 1986) (citations omitted); Weinberger v. Kendrick, 698 F.2d 61, 80 (2d Cir. 1982); Nemeroff v. Abelson, 620 F.2d 339, 348 (2d Cir. 1980); Browning Debenture Holders Comm. v. DASA Corp., 560 F.2d 1078, 1089 (2d Cir. 1977); Oliveri v. Thompson, 803 F.2d 1265, 1272 and 1273 (2d Cir. 1986).

It is quite clear from the 2nd Cir. and U.S. Supreme Court ruling and/or decisions that subjective bad faith is not even a requirement for imposition of sanctions in favor of a prevailing Defendant. See Davidson v. Keenan, 740 F.2d 129, 133 (2d Cir. 1984).

Once again, a careful review of the record will show that the District Court's findings of bad faith is not supported by any scintilla or atom of clear, direct, credible, competent or sufficient evidence. The sanction demonstrates the lack of any legal

requirement other than the talismanic recitation of the phrase" Bad Faith". The reasons given by the District Court in making its decision to sanction is **too weak to be convincing**. Thus the District Courts decision to sanction Attorney Umeugo should be reversed.

The United States Supreme Court has not defined what constitutes bad faith litigation conduct, as a result the District Courts are all over the water front as to bad faith litigation standards or what standard to apply. The lack of any legal requirement other than talismanic recitation of the phrase "bad faith" will foreclose meaningful review of sanctions based on inherent authority. Chambers, supra. As a result, the District Court Judges are left to determine on their own subjectively without guidance or uniformity as to what constitutes bad faith litigation conduct. As such, unjustified sanctions are granted as it is clear in this case at bar. Chambers, supra. Thus a thorough examination of sanctionable conduct gives insight as to the type of conduct that falls under the bad faith exception. In the case of Chambers v. Nasco, Inc., 501 U.S. 32 (1991), the U.S. Supreme Court clearly stated that without a showing of bad faith such as filing deliberate untruths, failing to comply with Court orders, devising a scheme of obstruction, delay or harassment and/or disrupting the litigation, the Court should not impose sanctions on parties or their attorneys.

A careful review of the District Court's reasons for imposing sanctions against Attorney Umeugo will clearly show that Attorney Umeugo did not engage in any sanctionable conduct. The District Court's reasons are simply assertions, inferences and presumption that are totally incorrect. They are not clear, direct,

competent or credible evidence as required by the 2nd Cir. and the U.S. Supreme Court in the aforementioned cases.

As a matter of fact the Courts have declined to uphold awards under the bad faith exception absent both clear evidence that the challenged actions are entirely without color and taken for reasons of harassment or delay, or for any improper purpose, Oliveri, 803 F.2d at 1272. The law requires clear and direct evidence before sanctions are imposed.

Clear and convincing evidence is defined as "evidence indicating that the thing to be proved is highly probable or reasonably certain. This is greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials." (Black Law Dictionary Deluxe 577 (7th ed. 1999))

Competent evidence is defined as "evidence that is worth of belief, trustworthy evidence." (Black Law Dictionary Deluxe 577 (7th ed. 1999))

Direct evidence is defined as "evidence that proves a fact without inference or presumption." (Back Law Dictionary Deluxe 577 (7th ed. 1999))

The District Court in its decision and Barden in its argument appears to indicate that the Court's inherent power is the rule. This argument is flawed because the inherent powers are the exception not the rule, and their assertion requires special justification in each case. That means in all applications involving the invoking of the inherent power of the Court, the

authority to sanction the alleged or challenged bad faith litigation practices can be exercised only when necessary to preserve the authority of the Court. Obviously in the case at bar, the authority of the District Court was never challenged by Attorney Umeugo and neither did he disobey the order of this Court in any way shape or fashion. No atom of evidence of disobeying the authority or order of the District Court was ever introduced by Barden or asserted by the District Court.

Further, the District Court's assertion that Plaintiff's counsel persisted in using the possibility that the Plaintiffs might pursue this claim further as leverage in his negotiations with Defendant in the lawsuits filed in the District Court is baseless inference, incorrect assertion and presumption made by the District Court without any clear direct evidence. The District Court never cited any instance or occasion in the court record which such was advocated or pursued by Attorney Umeugo before and after the Motion to Dismiss was granted. Because of this type of unjustified and baseless conclusion without specific instances or example, the U.S. Supreme Court has cautioned the lower courts against such. (See Ex parte Burr, 22 U.S. (9 Wheat.) 529, 531 (1824)). This is why in regards to the exercise of "inherent power", the 2nd Cir. has interpreted the standard restrictively stating .... "we have declined to uphold awards under the bad faith exception absent both 'clear evidence' that the challenged actions are entirely without color and are taken for reasons of harassment or delay or other improper purposes, and a high degree of specificity in factual findings of the lower Courts" Oliveri v. Thompson, 803 F.2d 1265, 1272, 1273 (2d Cir 1986).

II Requesting for Attorney's Fees and Costs Per Client's Instruction as Part of Remedies in Relief Sought Which Can Either Be Granted or Denied is Not a Sanctionable Conduct or Bad Faith Litigation Conduct Suggested in Chambers v. Nasco, Inc., 501 U.S. 32 (1991)

In regard to the attorney's fees, Attorney Umeugo was simply asking the District Court to consider attorney's fees and costs in the total amount of $2,000.00 during the Status Conference. There is no evidence in the Court record to show that Attorney Umeugo was insisting on the said attorney's fees because the case settled shortly thereafter for the full value of the water usage claim of $900.37 without the attorney's fees. Therefore Attorney Umeugo did not engage in a sanctionable conduct or bad faith litigation conduct.

Furthermore, the record shows that during the Status Conference when Attorney Umeugo raised the issue of the attorney's fees and costs, the District Court Judge did not address it, as to whether Attorney Umeugo's Client the Plaintiffs were entitled to it or not and Attorney Umeugo never pressed the District Court for it or insisted or continued to ask for it. As a matter of fact the record shows that the case resolved for the full value of the water usage claim of $900.37 as the District Court suggested without the attorney's fees and costs. This shows that Attorney Umeugo was not trying to extract more than the full value of the water usage claim which was $900.37. Attorney's fees and costs are always considered as separate items of damage(s) and relief in both Federal and State Courts. Therefore, asking for attorney's fees and costs was not an act designed to extract more than the full value of

the water usage claim. Attorney's fees and costs are requested as expenses that a litigant incurred and may be recovered if requested in a timely fashion in a viable or colorable claim as it is in this case.

It is a common practice in both Federal and State Courts for litigants and their attorneys to request as part of the relief sought attorney's fees and costs especially in viable claims. If lawyers are now subject to sanctions for requesting attorney's fees and costs for their clients in viable or colorable claims it will no doubt deter lawyers all over the United States from asking for attorney's fees and costs for their client for fear that they will be sanctioned. See Dow Chem. Pac. Ltd. v. Rascator Mar. S.A., 782 F.2d 329, 344 (2d Cir. 1986).

For lawyers to be sanctioned for requesting attorney's fees and costs for their clients in viable claims is totally unheard of in the Annals of American Jurisprudence.

Since this District Court's decision to sanction which was affirmed in part by the U.S. Court of Appeals for the 2nd Cir. was based on a clearly erroneous view of the law and erroneous assessment of the evidence, the District Court abused its discretion, thus its decision should be reversed. See Sussman v. Bank of Israel, 56 F.3d 450, 456 (2d Cir.) cert. denied, 516 U.S. 916 (1995).

Also, the 2nd Cir. in its decision to affirm in part and vacate in part the District Court's decision to sanction, stated that Attorney Umeugo engaged in groundless procedural steps, but the Appellate Court did not indicate the groundless procedural step that

Attorney Umeugo allegedly engaged in. Therefore, this Appellate decision to affirm in part the District Court's decision to sanction should be reversed.

The United States Supreme Court and the Appellate Courts including the 2nd Circuit in various court rulings have clearly stated that in unequivocal terms that the courts must exercise caution in invoking its inherent power of determining that bad faith exists. Chambers v. Nasco, Inc., 501 U.S. 32 (1991). While the Court has inherent power to sanction, because of their very potency, inherent powers must be exercised with restraint and discretion. Chambers, supra. Due to their leveraged impact in the litigation process, sanctions against attorneys should not be given a broad-brush approach. Oliveri v. Thompson, 803 F.2d 1265, 1272, 1273, 1281 (2d Cir. 1986).

The Court, in recognizing the need for restraint, has always required a particularized showing of bad faith to justify the use of the courts inherent power. United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., 948 F.2d 1338, 1345 (2d Cir. 1991). Meaning that the Court demands or insisted on clear and direct evidence not drawing of interferences and presumption as the District Court did in this case at bar.

The Plaintiff and their counsel Attorney Umeugo 's decision to settle, saved the Court and the Defendants further Court proceedings, attorneys fees and costs of hearing the Motion to Reconsider. The Plaintiffs and their counsel Attorney Umeugo should be commended instead of penalizing or punishing them via the said sanctions for following the suggestion of the District

Court Judge. For the District Court Judge to suggest to the Plaintiffs and their counsel to settle the case(s) and to turn around and sanction them is a clear manifestation of "inherent inconsistency" and abuse of discretion.

Moreover, the District Court Judge stated in his effort to encourage Barden's counsel, Mr. Wellington to settle the water usage claim after he withdrew his offer to settle and file a Motion to Dismiss the water usage claim at the January 24, 2002 status conference that "but it seems to me that what...the Plaintiff still has the ability to appeal my ruling on the Motion to Dismiss. And although I think it was correct I can't guarantee that he wouldn't be successful on appeal, and I think that what he has done on settling with other parties if those other parties had be given some...have been given not some they have been given finality." (District Court Transcript January 24, 2002, p 8 lines 1-7, U.S. Court of Appeals App. 26).

The aforementioned statement or comment by the District Court Judge shows or proves that Plaintiffs claim has merit to it. If not, he would not have made such a strong statement. Attorney Umeugo was never evasive in responding to the Court and he never stated such at the Status Conference that he will continue the litigation as leverage in settlement negotiations. The District Court's reason for sanctioning Attorney Umeugo is not supported by clear, direct, credible or competent evidence.

The District Court's reason for sanctioning Attorney Umeugo is unjustified and absolutely wrong. The District Court claimed that the Plaintiff's counsel would have accepted immediately Barden's offer to

settle the water usage claim by paying $900.37 without exercising or exploring their option to either appeal or file a Motion to Reconsider, is absolutely wrong. The exercise of Plaintiffs right to weigh their option i.e. Appeal or Motion to Reconsider within reasonable time is not a sanctionable conduct. The January 16, 2002 transcript of the Status Conference stated the following, "So I think you ought to do some research on that in advance before you go to the settlement conference because Judge Martinez, will be pressing you for an explanation if that's not...if your position at that time is that you're going to continue with the case. And the other piece of advice that I will give you is that your maximum bargaining position in terms is settling is between now and the settlement conference (February 8, 2002), because once---because what these parties are looking at is the expense incurred and the inconvenience to their clients of coming to the settlement conference. Once they show up, the cost and that expense is off the table. So they are going to ....you're not going to be able to get as much out of them." (District Court Transcript January 16, 2002 at 5 & 6 App. 13 and docket sheet App. 1)

Plaintiff's counsel Attorney Umeugo never stated to the Court that he was using the remaining cases that have not been dismissed as leverage to collect for water usage. The Court never cited any of the Court Transcript as to where Attorney Umeugo stated such. It is apparent that the District Court Judge was speculating and drawing incorrect inference. They are not clear, direct, credible and convincing evidence as required or mandated by the U.S. Supreme Court whenever a District Court Judge exercises its' inherent power. It is clear from the District Court Judge's comment or statement at the status conference on

January 24, 2002, that the Plaintiff still has their option to appeal his decision or file a Motion for Reconsideration.

It is mind boggling and highly inconceivable that the Plaintiffs and Attorney Umeugo were sanctioned for following or adhering to the District Judge's suggestion to settle the case.

The District Court referenced in its decision to sanction, that Attorney Umeugo on January 22, 2002, Status Conference made settlement offers to Barden and insisted seeking to obtain from $900.37 for water usage fees and $2,000.00 for attorney's fees and costs for litigating the claim is not a sanctionable conduct. An attempt to settle the case in compliance or in following the District Courts suggestions to settle is not a sanctionable litigation conduct, in any stretch of the imagination.

The Courts have declined to uphold awards under the bad faith exception absent both clear evidence that the challenged actions are extremely without color and taken for reasons of harassment or delay or any improper purpose. Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986). The District Court Judge conceded or admitted that he never ruled on a Motion for Sanction before. It appears then he was using this decision as a target practice against Attorney Umeugo, who obviously followed or complied with all the suggestions by the District Court including settling the case(s).

Moreover, the District Court never expressed any concern about the request to consider attorney's fees and costs in connection with the water usage claim.

Attorney Umeugo complied with every Court order including the Court's scheduling of settlement conferences to promote the speedy resolution of the action. There is no clear evidence offered by Barden to support such an allegation of violation of rule 31(a) on the part of the Plaintiffs' Counsel. On the other hand, Barden's counsel continues to burden the Court's time and resources by submitting discovery requests which in fact, Judge Thompson, the District Court Judge, specifically told Barden's Counsel that such requests for discovery would be costly and then suggested an expeditious way to resolve the matter (see District Court Transcript dated January 24, 2002, District Court 9, 10 lines 20-22 U.S. Court of Appeals App. 26).

Sanctions should not be assessed lightly without fair notice and opportunity for a hearing on the record. Roadway Express, Inc. v. Piper, 447 U.S. 752, at 26, 30 (1980). A Court must exercise caution in invoking its inherent power and it must comply with the mandates of due process. Chambers v. Nasco, Inc., 501 U.S. 32 (1991). It is quite clear from the Supreme Court's ruling and/or decision that subjective bad faith is not even a requirement for imposition of sanctions in favor of a prevailing Defendant. (See Davidson v. Keenan, 740 F.2d 129, 133 (2d Cir. 1984)).

The District Court's reason for sanctioning Attorney Umeugo is simply ridiculous. The District Court stated that it was sanctioning Attorney Umeugo because of the comment he made at the January 24, 2002, status conference that he will accept $900.37 offer to settle made by Barden's Counsel as opposed to Barden, Winsted, Howard, Mattuck and other Defendants.....because other Defendants should not benefit from the said payment of settlement for water

usage fees. The District Court's quotation of Attorney Umeugo comment is incorrect. The incorrectness is established if you examine the section dealing with the discussion at the January 24, 2002, Status Conference.

The said statement made by Attorney Umeugo, is not sanctionable litigation conduct, because at that point in the litigation, the Plaintiffs still had the option to appeal the District Judge's decision on the Motion to Dismiss. Secondly, the Plaintiff's costs and attorneys fees from bringing the said action including the water usage fee was never addressed by the District Court except later on at the January 24, 2002, Status Conference when Attorney Umeugo raised the issue of attorney's fees and costs.

The very fact that all the cases were settled at the January 24, 2002, Status Conference in compliance with the District Courts suggestions without further Court proceedings clearly shows that Attorney Umeugo did not harass, delay or act with any improper purpose or motive against Barden or any other Defendants.

The District Court's continued speculation and drawing of wrong or incorrect inferences was clearly manifested in its final reason for sanctioning Attorney Umeugo. The District Court alleged that Attorney Umeugo made an untrue statement when he said he did not know **initially** that Barden's offer to settle was for Barden and it was for the purpose of extracting from other Defendants payment. There is no question that the District Court took the statement out of context in order to achieve its unjustified sanction or agenda. Attorney Umeugo did not make any untrue statement. It is worth nothing that there was a

discussion in open Court going back and forth regarding to settling the case.

The discussion that took place in Court January 24, 2002 at the Status Conference hearing was that the Judge asked Barden's Counsel "how at the last proceeding I wasn't sure.....I did not ask you the question, Mr. Wellington, when you stood up and offered, made the offer of $900.37 on behalf of which parties was that being made?" Barden's Counsel Mr. Wellington replied, "Barden Corporation your Honor." Then the Judge said, "Barden not the other parties you represent?" Barden's Counsel replied again "Barden" .....Then in response Attorney Umeugo stated, "Your Honor, just in response to the Defendants indication that his offer was for $900.37 for Barden. That wasn't our understanding. It appears to me that our understanding was that he was offering that for all the Defendants. So if that was the case that he was offering that $900.37 for Barden, my client is willing to take a judgment in that regard for the amount and then let the Defendant Barden go." (See District Court Transcript of January 24, 2002 Status Conference p. 5 lines 11-25 and p. 6 lines 1-11 District Court App. 26).

It was Attorney Umeugo's understanding that by getting Barden to go, via settling its case, the Court will then address what will happen to the other Defendants, the attorney's Fees and Costs incurred by the Plaintiffs.

It is clear from the aforementioned that the District Court Judge himself did not know what Barden's offer was for. So then, it is obvious that the District Court's allegation that Attorney Umeugo's statement was untrue, was absolutely incorrect, a clear contradiction

as to what occurred at the said status conference hearing.

Further, it is extremely sad, unjust and an abuse of discretion for a District Court Judge to take or fish out or isolate such a statement out of context and incorrectly use it in order to grant and/or pursue an unjust sanction. Once again it is worth nothing that all the cases settled at the January 24, 2002, status conference hearing (see District Court Transcript January 24, 2002). If Attorney Umeugo wanted to extract a settlement from other Defendants and harass Barden and other Defendants, the case would not have settled at the January 24, 2004, status conference in compliance with the District Court's suggestion to settle.

The District Court's statement in its opinion for sanction page 33 ¶2 (App. 40a) that the Court observed that when the Plaintiffs' Counsel initially rejected Barden's offer of $900.37 on January 16, 2002, declaring it unacceptable, he did so without consulting with his client, who was seated in the courtroom at the time. The District Court's said observation is wrong, incorrect and speculative, because the Plaintiffs have indicated very clearly to Attorney Umeugo before the said status conference and during the hearing that he will not accept the said offer at that time until he had time to explore, consider and decide his option to appeal the decision on the Motion to Dismiss. Later on at the January 24, 2002 status conference hearing the Plaintiff accepted the offer to settle all the cases in compliance with the District Court's suggestion.

III This Case is an Excellent Vehicle to Resolve an Important Question of the Federal Court's Rule Pertaining to Sanctionable Litigation Conduct

It logically follows that a District Court should rely on text based authority derived from congress rather than inherent power in every case where the text-based authority applies." (See Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988)).

In the case at bar, there is no statue or textual provision that Attorney Umeugo violated and the District Court had not found him in violation of any or used any statute as the basis of its sanction order and Barden has not adduced any specific statute or textual provision that Attorney Umeugo violated as prescribed by Congress or statute that should be used as a basis for sanction. See Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958). It is worth nothing that these statutes dealing with litigation conduct limit the manner in which the power shall be exercised. The District Court relied on inherent authority as the exclusive basis for sanctions. Attorney Umeugo did not engage in any sanctionable litigation conduct or act.

The American rule "protects each person's rights to go to Federal Court to defend and vindicate substantive rights. Since litigation is, at best, uncertain, one should not be penalized for merely defending or prosecuting a lawsuit." Fleischmann Distilling Corp. v. Maier Brewing Co., 389 U.S. 714, 718 (1967).

In North Carolina v. Pearce, 395 U.S. 711, 724 (1969) the Supreme Court stated very clearly that "A Court is without right to ... put a price on appeal."

The Appellate Court held that Attorney Umeugo did not engage in any sanctionable litigation conduct prior to the District Court's January 7, 2002, opinion dismissing the original Complaint in its entirety or in connection with the Motion to Dismiss. (App. 7a)

However, with due respect, the Appellate Court was incorrect or in error when it affirmed in part the District Court's decision (the award of attorney's fees and expenses in the amount of $32,712.00) that Attorney Umeugo engaged in bad faith litigation conduct and/or sanctionable litigation conduct by requesting or including for consideration by the District Court the attorney's fees and costs, in the Amended Complaint or during Status Conference for the water usage claim. (App. 9a)

Also, the Appellate Court was incorrect in concluding that Attorney Umeugo repeatedly rejected efforts to settle the water usage claim for its full value, and was planning to use the nuisance value of continued litigation as leverage in his settlement negotiations, and that Attorney Umeugo actually attempted to follow through on this statement and extract more than full value of any outstanding claims he may have had against Barden and similarly situated Defendants. (App. 5a)

As already stated, there is no evidence in the Court record to show that Attorney Umeugo repeatedly rejected efforts to settle the water usage claims. To include attorney's fees and costs in a Complaint and/or

Amended Complaint is not a sanctionable litigation conduct. The Law seems to be clear that if a claimant or Plaintiff failed to include in the relief or remedies that he sought a request for attorney's fees and costs he may be precluded from asserting such later on in the litigation. It is up to the Court to decide if attorney's fees and costs should be awarded or denied based on the law and equitable remedy.

If the request for attorney's fees and costs becomes sanctionable litigation conduct, then it stands to say or reason that all lawyers that practice in the Federal Courts throughout the United States will be affected. This Appellate Court decision has a very wide implication and effect on all practicing lawyers.

The record clearly shows that the District Court in this case, never addressed the issue of attorney's fees and costs in regards to the water usage claim and the District Court never stated to Attorney Umeugo not to request attorney's fees and costs, and Attorney Umeugo did not disobey the District Court in any way shape or fashion.

Further, requesting for attorney's fees and costs is not the type of thing or conduct that the Supreme Court suggested and/or contemplated as sanctionable conduct in its decision in Chambers v. Nasco, Inc., 501 U.S. 32 (1991). The United States Supreme Court clearly stated in Chambers, supra, that without a showing of bad faith such as filing deliberate untruths, failing to comply with the court orders, devising a scheme of obstructions, delay or harassment and/or disrupting the litigation, the Court should not impose sanctions on parties or their attorneys.

If the District Court was of the opinion that the request for attorney's fees and costs for the water usage claim in the Amended Complaint was wrong, the District Court should have indicated so at the Settlement Conference, but did not. The record shows that the District Court never addressed the issue of the attorney's fees and costs. All that the District Court should have done is simply state that the Plaintiffs were not entitled to attorney's fees and costs.

Clear direction and/or guidance is needed in regards to sanctionable or bad faith litigation conduct to avoid unjust sanction or to avoid deterring attorneys and their clients from pursuing viable or colorable claims, i.e., requesting Attorney's Fees and Costs.

Moreover, Attorney Umeugo settled the water usage claim for its full value of $900.37 in accord with the District Court's suggestions.

IV When a Court Decision is Based on an Erroneous View of the Law or the Assessment of the Evidence, That Decision is an Abuse of Court Discretion.

The Court record shows none of Attorney Umeugo's action after January 7, 2002, especially in regards to water usage claims were taken for reasons of harassment or delay or for improper purposes. See Dow Chem. Pac. Ltd. v. Rascator Mar. S.A., 782 F.2d 329, 344 (2d Cir. 1986) and thus were not sanctionable litigation conduct.

Attorney Umeugo did not repeatedly reject the efforts to settle the water usage claim for its full value, to the contrary the water usage claim settled within a

week in line with the District Court's suggestion and prior to the Settlement Conference with Judge Martinez. There is no evidence on the record to show that Attorney Umeugo repeatedly rejected the efforts to settle the water usage claim and he did not disobey the District Court Judge. As a matter of fact, it was the respondent's counsel who withdrew his offer to settle the water usage claims for its full value, until the District Court Judge convinced him to put back the offer to settle on the table.

The Court has clearly stated that "A District Court necessarily abuses its discretion if it bases its ruling on erroneous view of the law or on a clearly erroneous assessment of the evidence." Sussman v. Bank of Israel, 56 F.3d 450, 456 (2d Cir.) cert. denied, 516 U.S. 916 (1995).

The District Court in granting the Motion to Sanction abused its discretion because its decision to sanction or ruling was based on erroneous view of the law or on a clearly erroneous assessment of the evidence, therefore its decision should be reversed.

V Since There is No Clear, Direct, Credible or Competent Evidence to Support the District Court's Decision to Sanction, Which was Affirmed in Part by the U.S. Court of Appeals its Award of Attorneys Fees and Expenses or Costs was in Error or Abuse of Discretion.

The United States Supreme Court has warned against creating a second lawsuit over attorney's fees. See Hensley v. Eckerhart, 461 U.S. 242, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). Counsel for Barden, Attorney Wellington, did exactly so in this case at bar

by filing a Motion for Sanctions without clear, direct, credible and competent evidence. Counsel for Barden and the District Court knew quite well that there is no Federal or State Statue allowing it to recover attorney's fees after its Motion to Dismiss was granted in part and denied in part. So to seek recovery of attorney's fees, it resorted to a Motion to Sanction under inherent power of the Court and falsely claiming bad faith litigation knowing quite well that there is no definition of bad faith by the Supreme Court as guidance for the District Courts.

As the U.S. Court of Appeals noted in its decision to affirm in part and vacate in part the District Court's decision to sanction that; "Barden spent more than $57,000.00 in connection with the Sanctions Motion, all the while knowing that it would seek to have those costs and fees imposed upon Attorney Umeugo. Although we might question the propriety of Barden's actions in this regards....."

The aforementioned clearly established that Barden's Counsel created a second lawsuit over attorney's fees. This is proven by the very fact that the Defendants represented by top legal minds and law firms i.e. Wiggin & Dana, Tyler, Cooper & Alcorn etc. did not a file a Motion for Sanction.

As in many Supreme Court decisions the "American Rule prohibits Federal Courts from awarding Attorney's fees in absence of a statue or contract providing for a fee award as it is in this case at bar." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-259 (1975). To circumvent the Supreme Court holding in the Alyeska Pipeline Service case,

Barden resorted to a Motion for Sanction without clear, credible and competent evidence.

Since there is no clear, direct credible or competent evidence to support the District Court's Decision to sanction which was affirmed in part by the U.S. Court of Appeals, its awards of attorney's fees and expenses or costs was in error and an abuse of discretion.

CONCLUSION

The ultimate question in this case is whether requesting for attorney's fees and costs be considered in an Amended Complaint and or during a Settlement Conference in connection with a viable claim is sanctionable or bad faith litigation conduct. The important question underlie the issue presented for review makes this case an excellent vehicle for the Court to provide much needed guidance to all litigants and their attorneys and the Court. The issue presented for review has a far reaching impact applying to all lawyers practicing in the Federal Courts and the litigants.

Attorney Umeugo is hopeful the Court will capitalize upon this opportunity to articulate a reasonable, universal standard to determine what constitutes sanctionable or bad faith litigation conduct pursuant to Court inherent power.

The District Court's decision to sanction Attorney Umeugo and the award of attorney's fees and costs is not supported by clear, direct, credible, competent, sufficient and convincing evidence as mandated by the Appellate Courts and the U.S. Supreme Court's various rulings.

It is quite clear that the District Court Judge in the case at bar gave the Motion for Sanctions a broad-brush approach. The 2nd Circuit has made it very clear that "sanctions against Attorneys should not be given a broad-brush approach" Oliveri v. Thompson, 803 F.2d 1265, 1272, 1272, 1281 (2d Cir. 1986). It appears by the District Court's unjust decision that Barden was commended and rewarded for delivering hazardous wastes on the Plaintiff's property in violation of Federal Laws. It is obvious that the District Court Judge in his unjustified decision ignored the weightier matters of the law and constitutional rights namely **"justice"**. For the foregoing reasons set forth above, Attorney Umeugo respectfully submits that the Petition for Writ of Certiorari should be granted.

Respectfully Submitted

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 06-5013-cv

[Filed January 21, 2009]

ATTORNEY IKECHUKWU UMEUGO,
Interested-Party-Appellant,

RALPH BELLO and VERA ASSOCIATES LIMITED PARTNERSHIP,
Plaintiffs,

- v -

BARDEN CORPORATION,
Defendant-Appellee.

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION

APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: (SUMMARY ORDER). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW. CA2.USCOURTS. GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 21st day of January, two thousand nine.

PRESENT:
HON. DENNIS JACOBS,
Chief Judge,
HON. GUIDO CALABRESI,
HON. ROBERT D. SACK,
Circuit Judges.

FOR APPELLANT: Ikechukwu Umeugo, Umeugo & Associates, P.C., West Haven, CT.

FOR APPELLEE: David S. Hardy, Carmody & Torrance LLP, New Haven, CT.

Appeal from the United States District Court for the District of Connecticut (Alvin W. Thompson, Judge).

UPON DUE CONSIDERATION, it is HEREBY ORDERED, ADJUDGED, and DECREED that the judgment be AFFIRMED in part and VACATED and REMANDED in part.

Although we assume the parties' familiarity with the underlying facts and procedural history of this case, we nonetheless outline the facts underlying this summary order.

From 1984 to 1997, Bello and Vera Associates, the plaintiffs in this case, rented land to a variety of companies, collectively known as National Oil Services, for the operation of a waste oil storage, treatment, transfer, recycling, and disposal facility. On January 8, 1998, there was an oil spill on the property. The United States Environmental Protection Agency ("EPA") eventually conducted a cleanup of the site at a cost in excess of $1.1 million.

The plaintiffs, represented by lawyer Ikechukwu Umeugo, the sole appellant here, brought suit against many different entities, including National Oil Services' suppliers of oil, seeking recovery for damage to their property and for their lost profits. Barden Corporation was one such defendant. Plaintiffs brought a series of suits, first in Connecticut state court without success, and then in federal court.

Barden eventually moved to dismiss plaintiffs' federal complaint against it. By opinion and order dated January 7, 2002, the district court granted Barden's motion in its entirety, but gave plaintiffs leave to amend the complaint to add a contribution claim under section 9613(f)(1) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 et seq., as amended, ("CERCLA") for $900.37 in water-usage fees paid by plaintiffs in connection with the EPA cleanup of the property. See Bello v. Barden Corp., 180 F. Supp. 2d 300, 309-12 (D. Conn. 2002). Shortly thereafter, on January 24, 2002, Barden, along with three other defendants, settled the water-usage claim with plaintiffs for the full amount, and on that basis the district court immediately dismissed the various related cases as moot. Approximately one month later, on February 27, 2002, Barden moved for sanctions against Umeugo, Bello, and Vera.

More than four years later, by opinion and order dated September 29, 2006, the district court granted Barden's motion for sanctions against both Umeugo and his clients, and directed Barden to file an application for fees and costs. See Bello v. Barden Corp., No. 01 Civ. 1531, 2006 WL 2827091, at *15, 2006 U.S. Dist. LEXIS 71385, at *43 (D. Conn. Sept. 29, 2006). One year later, on September 28, 2007, the court awarded sanctions against Umeugo and his clients jointly in the amount of $67,192, constituting $54,606 in Barden's fees incurred and sought in litigating its motion to dismiss, and $12,588 in Barden's expenses incurred throughout the litigation. The Court awarded an additional $32,762 against Umeugo constituting a portion of Barden's fees

incurred and sought in connection with its motion for sanctions.

Although we are not without doubt as to the propriety of the award against the plaintiffs, Umeugo appeals only for himself. He asserts that the district court erred in granting Barden's motion for sanctions, insisting that he engaged in no sanctionable conduct. For the following reasons, we reject this argument.

Umeugo insists that there is no "clear evidence," that any of his actions were "entirely without color" or taken "for reasons of harassment or delay or for other improper purposes." See Dow Chem. Pac. Ltd. v. Rascator Mar. S.A., 782 F.2d 329, 344 (2d Cir. 1986) (internal quotation marks omitted). But "[t]his Court reviews all aspects of a District Court's decision to impose sanctions for abuse of discretion," United States v. Seltzer, 227 F.3d 36, 39 (2d Cir. 2000) (internal quotation marks omitted), and the district court was within its discretion to conclude that Umeugo's actions, at least after January 7, 2002, were sanctionable. As of that date, the district court had granted Barden's motion to dismiss the complaint in its entirety, with leave for plaintiffs to amend to add one claim, the water-usage contribution claim for $900.37. Umeugo repeatedly rejected efforts to settle that claim for its full value. And Umeugo stated in court on the record that he was contemplating making a settlement offer to various defendants that included "the cost of litigating that count that is left to the end." Bello, 2006 WL 2827091, at *7, 2006 U.S. Dist. LEXIS 71385, at *18. Under the totality of the circumstances, the district court did not abuse its discretion in finding both that Umeugo stated "explicit[ly] . . . that he was planning to use the nuisance value of continued

litigation as leverage in his settlement negotiations," and that Umeugo actually attempted to follow through on this statement and extract more than the full value of any outstanding claims he may have had against Barden and similarly situated defendants. Id., 2006 WL 2827091, at *13, 2006 U.S. Dist. LEXIS 71385, at *37. For the reasons stated by the district court, it did not abuse its discretion in concluding that Umeugo engaged in sanctionable conduct.

Umeugo also argues that, even assuming the district court properly awarded sanctions, it nonetheless erred in calculating the amount of sanctions. Barden contends that Umeugo has not preserved the argument, but we disagree. Umeugo contends on the first page of his brief on appeal that "the district court[']s award of Attorneys fees and expenses or costs, was in error or abuse of discretion," and again later in the brief that the district court erred by "add[ing] attorneys fees that Barden Corporation allegedly claim[s] it incurred from [the] beginning of the case up to the motion to dismiss."

A district court's award of sanctions is reviewed for an abuse of discretion, but "this Court must be careful to ensure that any . . . decision to sanction a party or attorney is made with restraint and discretion." Seltzer, 227 F.3d at 39 (alterations and internal quotation marks omitted). A district court "necessarily abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Sussman v. Bank of Israel, 56 F.3d 450, 456 (2d Cir.) (internal quotation marks omitted), cert. denied, 516 U.S. 916 (1995). As a general rule, "[o]nly those fees attributable to the offensive conduct can be awarded," because "under

[the] bad faith exception to [the] American Rule, [a] fee award [is] limited to expenses necessary to counter [a] losing party's bad faith." Ostano Commerzanstalt v. Telewide Sys., Inc., 880 F.2d 642, 650 (2d Cir. 1989)(citation omitted).

Approximately two-thirds of the $100,000 awarded constitutes expenses Barden claims that it incurred in the context of the underlying motion to dismiss. However, the record does not establish that Umeugo engaged in any bad faith conduct prior to or in connection with that motion.

The district court faults Umeugo for having brought multiple lawsuits against multiple defendants instead of suing all defendants together in one suit. Bello, 2006 WL 2827091, at *11, 2006 U.S. Dist. LEXIS 71385, at *30. However, a plaintiff has the right to file potentially meritorious lawsuits in the form that it chooses. Cf. Sussman, 56 F.3d at 457 ("Attorneys are not under an affirmative obligation to file an action in the most convenient forum; their only obligation is to file in a proper forum." (internal quotation marks omitted)).

The district court also faults Umeugo for filing claims in federal court "while never articulating a theory as to why the claim was not frivolous." Bello, 2006 WL 2827091, at *12, 2006 U.S. Dist. LEXIS 71385, at *34. But it is Barden's burden to demonstrate that the claim was frivolous, not Umeugo's to demonstrate that it was not. Nor does the district court point to evidence in the record demonstrating that Umeugo actually believed that he was asserting meritless claims. Although the district court ultimately concluded that the two claims

asserted by plaintiffs in their initial complaint -- one for damages under CERCLA and the other for damages under Connecticut tort law -- were without merit, that is of course an insufficient ground for the imposition of sanctions. The district court observed, moreover, that although it thought that its "ruling was correct," it could not "guarantee that [Umeugo] wouldn't be successful on appeal," a statement which we read as in tension with the conclusion that the claim was transparently meritless. Indeed, Umeugo's ultimate strategy was successful in part -- he was able to secure relief, however modest, for his clients pursuant to CERCLA.

While, as noted, we affirm the sanctions judgment in part, we cannot affirm it in its entirety because it far exceeds "those expenses reasonably incurred [by Barden] to meet [Umeugo's] groundless, bad faith procedural moves." Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1089 (2d Cir. 1977). Barden is entitled only to costs and fees relating to Umeugo's sanctionable conduct -- that is, Umeugo's conduct in connection with the water-usage claim -- and not to costs or fees incurred prior to the district court's January 7 opinion dismissing the original complaint in its entirety.

Therefore, we vacate the district court's award of $54,606 in fees incurred and awarded in connection with the motion to dismiss. We also vacate in toto the $12,588 in expenses incurred by Barden throughout the litigation, including in connection with its motion to dismiss. Under the circumstances, the amount of the award that we affirm, $32,762, is more than sufficient to compensate Barden for its costs

reasonably incurred to meet Umeugo's groundless procedural steps that he took in bad faith.*

Barden also asks us to deem this appeal frivolous pursuant to Rule 38 of the Federal Rules of Appellate Procedure so that it may recover damages and costs on appeal. By order dated May 21, 2008, a panel of this Court concluded that the appeal was not frivolous. To the extent that the relief Barden seeks was not

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* Although the district court did not abuse its discretion in concluding that Umeugo acted in bad faith by attempting to settle the water-usage claim, we are nonetheless concerned about the amount that Barden's counsel, Carmody & Torrance LLP, has sought for costs and expenses incurred after the district court's January 7 opinion -- more than $84,519.

Following the district court's January 7 opinion, the value of the non-dismissed portion of the lawsuit did not exceed $900.37. On January 22, 2008, Umeugo offered to settle the case for $2,900.37, constituting the full amount of the water-usage claim and $2,000 in attorney's fees. Bello, 2006 WL 2827091, at *8, 2006 U.S. Dist. LEXIS 71385, at *20. The district court did not err in concluding that Umeugo improperly sought to extract more than the full outstanding value of the claim. We note nonetheless that Barden could have settled the case in full for approximately $81,000 less than it actually spent in declining the offer and seeking sanctions before the district court, thereby preventing an appeal on this issue and its related costs.

In the period between January 16, 2008, and January 24, 2008, the time when the case was settled in full, Barden spent approximately $20,000 in fees. In addition, Barden spent more than $57,000 in connection with the sanctions motion, all the while knowing that it would seek to have those costs and fees imposed upon Umeugo. Although we might question the propriety of Barden's actions in this regard, we nonetheless conclude that the district court did not abuse its discretion in awarding Barden a portion of the fees that it sought, or $32,762.

foreclosed by that order, Barden's request is denied. As the foregoing discussion indicates, we think that, at least in part, the appeal has merit.

For these reasons, we affirm the award of $32,762 against Umeugo, representing Barden's fees in connection with its motion for sanctions, and vacate the award of $67,192 against Umeugo, representing Barden's fees in connection with its motion to dismiss and its litigation costs, and remand the case to the district court for such further action in connection with it that it may think warranted.

The $67,192 amount was awarded jointly against Umeugo, Bello, and Vera. As noted, we are mystified that the clients, Bello and Vera, have not, like their former counsel Umeugo, appealed. Our review of the record suggests that the clients' sanctionable conduct, or responsibility for their former counsel's actions held sanctionable, appears to be minimal at best. Because neither Bello nor Vera appealed, however, the propriety of the award against them is not before us. See Oliveri v. Thompson, 803 F.2d 1265, 1275 (2d Cir. 1986), cert. denied, 480 U.S. 918 (1987).

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED in part, VACATED in part, and remanded for further proceedings.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By:_____

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

No. 3:01cv01531 (AWT)

[Filed September 29, 2006]

RALPH BELLO AND VERA ASSOCIATES LIMITED PARTNERSHIP,

Plaintiffs,

v

BARDEN CORPORATION,

Defendant.

RULING ON MOTION FOR SANCTIONS

Defendant Barden Corporation ("Barden"), together with Mattatuck Industrial Scrap Metal, Inc. ("Mattatuck"), Winsted Precision Ball Company, Inc. ("Winsted"), and Howard Engineering Company ("Howard"), all represented by the law firm of Carmody and Torrance, mounted a joint defense to certain claims brought by the plaintiffs, Ralph Bello ("Bello") and Vera Associates Limited Partnership ("Vera Associates") in this action and three related cases filed in this court. Barden has moved for

sanctions against Bello and Vera Associates and their counsel. For the reasons set forth below, Barden's motion is being granted.

I. Factual Background

The plaintiffs are the owners of property located at 16-20 Elm Street in West Haven, Connecticut. Between January 9, 1984 and October 31, 1997, the plaintiffs rented this property to Robert Pattison, Sr. and certain corporations owned and/or controlled by him (collectively, "National Oil Services"). National Oil Services operated a waste oil storage, treatment, transfer, recycling and disposal facility at the property throughout that time.

During the same period, National Oil Services obtained waste oil from numerous companies, including Barden, Mattatuck, Winsted, and Howard. On or about January 8, 1998, there was a spill of hazardous substances that had been stored on the property.

The United States Environmental Protection Agency ("EPA") conducted a cleanup of the property between January 8, 1998 and June 30, 1998, at a cost in excess of $1,134,000. The EPA initiated proceedings under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601 et seq., as amended, ("CERCLA") to recover the costs it incurred in cleaning up the property. On October 1, 1998, the EPA placed a lien on the plaintiffs' property in the amount of $1,134,000.

In or about December of 2000, the plaintiffs filed seven complaints against approximately 59 defendants

in Connecticut Superior Court, asserting claims for damages the plaintiffs purportedly incurred as a result of the 1998 EPA cleanup of the property. Originally, each of the complaints was a one-count complaint sounding in negligence. The damages sought by the plaintiffs were as follows: (i) amounts to pay for release of the EPA lien in the amount of $1,134,000; (ii) property damage in the aggregate amount of $160,105.60; (iii) lost rents in the amount of $360,000; and (iv) undisclosed lost profits from two failed sales of the property.

On March 19, 2001, Palladin Precision Products, Inc. ("Palladin"), Mattatuck and Winsted (the "Palladin Group") filed a request that the plaintiffs revise their state court complaint naming them as defendants (the "Original Palladin Complaint") in 12 different respects. The Eleventh Request to Revise specifically asked the plaintiffs to identify the duty that those defendants purportedly owed the plaintiffs with regard to National Oil Services' management of waste materials at the plaintiffs' property.

On or about March 27, 2001, the plaintiffs requested leave to file an amended complaint as to the Palladin Group (the "Amended Palladin Complaint"). The proposed Amended Palladin Complaint contained three counts pursuant to which the plaintiffs sought the same recovery sought in the Original Palladin Complaint. The First Count in the proposed Amended Palladin Complaint alleged common law negligence, but it failed to allege any duty of care that any of the defendants in the Palladin Group owed the plaintiffs with regard to the management of waste materials at the property. The Second Count in the proposed Amended Palladin Complaint was brought under

Sections 107 and 113 of CERCLA. The Third Count in the proposed Amended Palladin Complaint alleged common law intentional and/or reckless conduct, but it also failed to allege any duty of care that any of the defendants in the Palladin Group owed the plaintiffs with regard to the management of waste materials at the property.

In April of 2001, the Palladin Group objected to the plaintiffs' request for leave to file the Amended Palladin Complaint on the ground that the plaintiffs had failed to respond to the pending requests to revise. The Palladin Group also objected to the CERCLA claim the plaintiffs sought to bring in the proposed Amended Paladin Complaint on the ground that the Connecticut Superior Court did not have subject matter jurisdiction over that claim.

During May 2001, plaintiffs' counsel made settlement offers to Palladin, Mattatuck, Winsted, BMI and Royal Screw Machine as to his clients' pending state claims. The plaintiffs' state court settlement offers were as follows: Palladin ($4,500), Mattatuck ($6,981), Winsted ($14,269.90), Royal Screw Machine ($5,000) and BMI ($1,000). The plaintiffs' counsel also made a settlement offer to Barden in the amount of $58,766.80 even though the plaintiffs had not filed an action against Barden in Superior Court. The plaintiffs' counsel was able to induce some defendants to settle his clients' negligence claims, which were identical to the negligence claims that had been brought in the Original Palladin Complaint.

The plaintiffs's seven state court complaints were transferred to the Connecticut Superior Court's complex litigation docket, where a motion was made to

consolidate the seven actions. On June 29, 2001, the plaintiffs filed a revised complaint against the Palladin Group (the "Revised Palladin Complaint"), in which they asserted a single negligence claim against each of the seven defendants named therein in a separate count for each defendant, including Palladin, Mattatuck and Winsted.

A hearing on the plaintiffs' request for leave to file the Amended Palladin Complaint and several motions by the defendants for nonsuit was held on June 29, 2001. At the time of the June 29, 2001 hearing, the Original Palladin Complaint, the plaintiffs' motion for leave to file the Amended Palladin Complaint, and the Revised Palladin Complaint were all pending before the Superior Court. The Superior Court denied the plaintiffs' request for leave to amend their complaints because the revised complaints filed by the plaintiffs were not responsive to the pending requests to revise. The Superior Court entered a nonsuit as to the plaintiffs' claims as to each defendant who had filed a request to revise. The nonsuit was a final judgment pursuant to which the plaintiffs had four months to move to reopen their case. The Superior Court thereafter issued written orders entering nonsuit as to 30 defendants who had filed requests to revise, including Palladin, Mattatuck and Winsted.

On July 31, 2001, the plaintiffs filed a complaint in this court naming a single defendant. See Bello v. Warner Lambert Co., Docket No. 3:01CV01436. Thereafter, on August 14, 2001, the plaintiffs filed 23 complaints in this court, each of which also named only a single defendant. Barden and Winsted were named in complaints filed on August 14, 2001. The claims against Barden and Winsted were identical.

The First Count of the plaintiffs' federal court complaint against Barden was brought under CERCLA, 42 U.S.C. §§ 9607 and 9613. The Second Count asserted a state law claim for "intentional and/or reckless" conduct. In their complaint, the plaintiffs sought the following amounts as damages for the following injuries or losses: (i) $125,910 for damage to an Abcor system; (ii) $34,195.60 for damage to oil tanks; (iii) $420,000 as damages for loss of rental income; (iv) an unspecified amount as damages in connection with two failed attempts to sell the property for $1,750,000; (v) $2,680 as damages for costs to be incurred in the future in connection with the cleanup of debris left on the property at the end of the EPA cleanup; (vi) $12,000 as damages for costs to be incurred in the future in connection with testing the pressure in the oil tanks; and (vii) $1,150 as damages for investigatory costs incurred to determine the extent of hazardous materials on the property.

The EPA filed two lawsuits in this court to recover costs the EPA incurred to perform the cleanup of the plaintiffs' property. On August 17, 2001, the EPA sued, inter alia, Bello and Vera Associates to recover those cleanup costs.

Also on August 17, 2001, the EPA commenced an action against Barden and some 400 other parties that had disposed of or arranged for the disposal of hazardous substances at the property through National Oil Services, seeking to recover its response costs under CERCLA. Many of the defendants in that action, including Barden, Winsted, Howard and Mattatuck, promptly accepted the EPA's settlement offer and agreed to pay their share of the agency's response costs. On September 14, 2001, a consent

decree (the "Consent Decree") memorializing the settlement was lodged with the court. See United States of America v. A-1 Auto Service, Inc. et al., Docket no. 3:01CV01567 (AHN) (D. Conn.). Notice of the Consent Decree was published in the Federal Register on October 4, 2001, and on December 19, 2001, the EPA filed a motion to enter the consent decree.

Paragraph 20 of the Consent Decree states, in relevant part, that:

> The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendants and the Settling Federal Agencies are entitled, as of the Effective Date of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are Past Response Costs.

(Doc. 16, Ex. C at 7.) The definitions section of the Consent Decree provides that "Past Response Costs" shall mean "all costs, including but not limited to direct and indirect costs, that EPA or DOJ on behalf of EPA has paid at or in connection with the site through May 15, 2001, plus accrued Interest on all such costs through such date." Id. at 2.

Thus, it was clear that once the Consent Decree was entered, Barden and the other "Settling Defendants" would have protection, pursuant to CERCLA § 113(f)(2), from contribution for matters addressed in the settlement.

On or about August 29, 2001, after the EPA had commenced its two actions in this court but before the lodging of the Consent Decree, the plaintiffs filed nine additional complaints in this court, naming a total of 41 additional defendants, including Howard and Mattatuck. The claims against Howard and Mattatuck were identical to the plaintiffs' claims against Barden and Winsted. In addition, the plaintiffs' CERCLA and common law intentional/reckless conduct claims in their federal complaints against Barden, Winsted, Howard and Mattatuck were identical to the plaintiffs' CERCLA and common law intentional/reckless conduct claims in the Amended Palladin Complaint, which had been filed against Mattatuck and Winsted. The law firm of Carmody and Torrance filed separate appearances in this court on behalf of each of Barden and Winsted on September 13, 2001 and on behalf of each of Howard and Mattatuck on October 11, 2001.

On or around October 12, 2001, the plaintiffs filed four additional complaints in this court, naming an additional 18 defendants. The number of defendants named by the plaintiffs in related lawsuits filed in this court totaled 83. The claims were in all material respects identical.

On October 19, 2001, the court held a joint status conference in approximately 34 cases filed by the plaintiffs. In almost every instance, the defendant or defendants in the case were represented at the status conference by counsel. Six of the defendants, including Barden, Winsted and Mattatuck, had filed motions to dismiss. The court decided to select and address first one motion to dismiss, as a method for resolving issues that would dispose of all issues raised in the motions to dismiss that had been filed or were expected to be

filed by other defendants. The court selected for this purpose the motion to dismiss that had been filed by Barden.

On October 24, 2001, the court had a conference with plaintiffs' counsel and counsel for Barden to discuss Barden's pending motion to dismiss. During that conference, there was a discussion of Barden's arguments for dismissal of the plaintiffs' claims, and plaintiffs' counsel indicated there might be additional claims under CERCLA that had not been included in the complaint. Plaintiffs' counsel was ordered to identify in the plaintiffs' opposition memorandum any other CERCLA claim the plaintiffs might have, in order to avoid repeated rounds of amended pleadings followed by additional motions to dismiss.

When the plaintiffs filed their opposition to Barden's motion to dismiss on November 9, 2001, they identified one additional claim under CERCLA, which was a claim for water usage fees in the aggregate amount of $900.37.

On or about October 26, 2001, plaintiffs' counsel extended settlement offers with regard to the plaintiffs' federal claims as follows: Barden ($49,951.78), Winsted ($12,129.42), Howard ($5,625.81) and Mattatuck ($5,358.40). The plaintiffs' written settlement offers advised Barden, Winsted, Howard and Mattatuck that they were being asked to settle the plaintiffs' claims against them for the same amount they had paid to settle the EPA's claims against them. As of October 26, 2001, plaintiffs' counsel was aware or should have been aware that Barden, Winsted, Howard and Mattatuck would be entitled to contribution protection under CERCLA

once their settlements with the EPA were approved by the court.

In ruling on Barden's motion to dismiss, the court dismissed all the plaintiffs' claims with prejudice because they failed to state a claim for which relief could be granted, but granted the plaintiffs' leave to amend the complaint to include the claim for recovery of $900.37 for water usage fees, which had not been included in the complaint. The court's ruling spelled out in detail the reasons why the plaintiffs' claims should be dismissed with prejudice. The ruling noted that the plaintiffs set forth two claims in the First Count, the first claim being one brought under CERCLA § 107(a), i.e., 42 U.S.C. § 9607(a), and the second being a claim for contribution brought under CERCLA § 113(f)(1), i.e., 42 U.S.C. § 9613(f)(1). As to the first claim under CERCLA, the ruling directed the plaintiffs to authority standing for the proposition that as owners of the property where the release of hazardous materials occurred, the plaintiffs were potentially responsible parties under CERCLA and a potentially responsible party may not bring suit under CERCLA § 107(a). As to the second CERCLA claim, i.e., the claim for contribution, the ruling directed the plaintiffs to authority for the proposition that a private party cannot recover under CERCLA for property damage resulting from a release of hazardous substances, nor for economic losses suffered as a consequence of such a release. As to the claim for investigatory costs, the ruling noted that such costs are recoverable under CERCLA only if they conform to the national contingency plan and also noted that:

> The plaintiffs have not alleged that such investigatory costs conform to the national

> contingency plan, nor have they indicated in their opposition to the motion to dismiss that they contend that such costs, in fact, conform to that plan. This is so notwithstanding the fact that a prominently featured argument in support of the motion to dismiss is that the plaintiffs failed to allege that the work related to these costs was performed "in a manner consistent with" the national contingency plan.

(Ruling on Mot. to Dismiss (Doc. No. 21) at 16-17.)

As to the Second Count, the ruling pointed out that the claim was barred by the applicable statute of limitations and also that the plaintiffs had failed to allege the requisite elements of the claim. Significantly, the ruling stated that the plaintiffs had failed to allege any facts that would support a finding that Barden owed them any duty of care. (See id. at 24.)

On or about the day the court dismissed the plaintiffs' complaint against Barden, the court dismissed the plaintiffs' claims against the remaining defendants in the related lawsuits pending in this court. The orders dismissing those other claims incorporated by reference the court's analysis in its ruling on Barden's motion to dismiss.

On January 16, 2002, the court held a joint status conference in this case and approximately 22 related cases. Representatives of approximately 18 different law firms were present to represent approximately 30 defendants. At the beginning of the status conference the court noted that it was going to first inquire of plaintiffs' counsel as to how he intended to proceed in

light of the rulings that had been issued on the motions to dismiss in several of the cases. When the court asked plaintiffs' counsel whether he was going to file a motion for reconsideration, plaintiffs' counsel replied that doing so was an option that was being considered "very seriously." (Tr. of Beginning of 1/16/05 Status Conference (Doc. No. 38) at 1, 7.) The court inquired whether there was any reason for filing a motion for reconsideration other than the fact that the plaintiffs wished the ruling had been different. Plaintiffs' counsel responded as follows: "I will say – I'll go along with what you stated. I have all the reasons. I'm still exploring and looking into them to see how that would fit into the Motion to Reconsider." (Id. at 7, l. 12-15.) The court then noted that any motion for reconsideration would have to be filed by January 22, 2002. (See id.) No motion for reconsideration was ever filed.

Also, the court noted that in one case a motion for sanctions had been filed. (See id. at 5.)

Then just before the court met at the sidebar with counsel in each of the individual cases, Barden's counsel stated the following:

> Your Honor, if I may, it's our understanding that the sole claim remaining for the plaintiff is one for water fees in the amount of $900.37. We have tendered an offer of that total amount in settlement to obviate the need for all these conferences and further work. That's not been accepted today and we've made that offer and we renew that offer at this time.

(Id. at 10, l. 24 to 11, l. 5.) When the court asked plaintiffs' counsel to respond, his response was as follows: "Our response to him is that's not acceptable." (Id. at 11, l. 8-9.)

The court then met at sidebar with counsel in each of the individual cases to discuss how each case would proceed. At the end of that process, the court invited Bello to join plaintiffs' counsel at the sidebar for a discussion with the court. The court stated the following to Bello and plaintiffs' counsel:

> I just want to make sure that counsel understand the implications of some of the things that have come up. You're going to have discussions during your settlement conference with Judge Martinez about whether the plaintiff is exposed to sanctions, and I'm expecting some vigorous filings because as things stand, unless there is a very good argument on the motion for reconsideration, and I really can't conceive of one . . . , you could very well find yourself in a case where the amounts of money that you got out of settlements with other cases gets wiped out if people make compelling arguments for sanctions. They are going to ask for costs. They are going to ask for attorneys' fees because we're now at a situation where what I've told the parties is roughly about $900 is what is at stake here.
>
> So I think if you're going to continue, you're going to have to have a pretty good argument as to why continuing to litigate the case and drive up expenses for all the parties for $900 where

it's really the same -- it's really the same amount that you're trying to get from each of those parties is not sanctionable conduct.

So I think you ought to do some research on that in advance before you go to the settlement conference because I'm pretty sure Judge Martinez is going to be pressing you for an explanation if that's not -- if your position at that time is that you're going to continue with the case.

(Tr. of End of 1/16/05 Status Conference (Doc. No. --) at 5, l. 25 to 7, l. 3.)

There followed additional discussion about the possibility of settlement, which led to the following statement by plaintiffs' counsel:

MR. UMEUGO: I understand that, Your Honor. What I'm talking about, to try to do that before the settlement conference.

THE COURT: Yes.

MR. UMEUGO: In terms of putting to them, putting out to them the cost of litigating that count that is left to the end and then present it as part of the offer to resolve.

THE COURT: That's your call, but I think what you're exposed to there is a motion for sanctions, but that's your call. I've never had to decide such a motion so I can't tell you how I would look at it.

(Id. at 10, l. 18 to 11, l. 4.) A moment later, the court stated the following to Bello and plaintiffs' counsel: "But you do have the possibility, if you don't handle this correctly, of having all the money you've recovered in settlement so far wiped out by a sanctions award. I wanted to make sure you understood that." (Id. at 11, l. 10-13.) The court then made a comment to the effect that the defendants were "all picking up on it." (Id. at 11, l. 15.) And the response by plaintiffs' counsel was "I understand that." (Id. at 11, l. 16.)

A moment later, in response to an inquiry as to whether he had any questions, Bello stated that he wanted a judgment for all of the court costs he had incurred and for all the damage that was done to his property and his equipment. The court explained to Bello that he was only entitled to get what the CERCLA statute allowed him to recover and that his lawyer would have to sit down with him and explain that to him. The court informed Bello that although it understood what he wanted, he was only entitled to recover what the law allows him to recover. A moment later, the status conference ended.

As noted above, the plaintiffs had filed federal complaints against a total of 83 defendants pursuant to which they sought recovery of the same monetary damages they were seeking to recover from Barden. At the time plaintiffs' counsel rejected Barden's third offer to pay his client's water usage fees in the aggregate amount of $900.37 on January 16, 2002, plaintiffs' counsel had already negotiated in excess of ten settlements and recovered settlement funds in an aggregate amount in excess of $52,200.

Immediately after the January 16, 2002 joint status conference ended, plaintiffs' counsel filed an amended complaint against Barden and Winsted, seeking to recover from each the amount of $900.37 for water usage fees.

On January 22, 2002, plaintiffs' counsel made settlement offers to each of Barden and Winsted seeking to obtain from each $900.37 for water usage fees and $2,000 for attorneys' fees and costs.

On January 22, 2002, Barden served notices on the plaintiffs and their counsel that it intended to seek its attorneys' fees and costs as a sanction against them at the conclusion of the litigation because in Barden's view they had engaged in a course of unwarranted, vexatious and oppressive conduct during the course of the litigation. Both notices of intention to seek sanctions were also filed with the court.

January 24, 2002 had been reserved for a hearing on any motion for reconsideration filed by the plaintiffs in response to the court's rulings on the motions to dismiss, and a status conference was held at that time in this case. In response to an inquiry from the court, plaintiffs' counsel represented that he had decided not to pursue a motion for reconsideration "in light of the court's position that each or all the parties should try to resolve this case in an amicable fashion," (Tr. of 1/24/02 Status Conference (Doc. No. 39) at 2, ll. 22-24.). However, the fact is that the plaintiffs never had a good-faith basis for filing any motion for reconsideration.

Also, the court inquired of plaintiffs' counsel as to whether he had received a copy of the notices of intent

to seek sanctions. In response, plaintiffs' counsel stated "we also will seek sanctions and costs against the defendant, against the lawyer representing the defendant as well as the defendants in question before the Court today," (Id. at 4, ll. 20-23), even though there was no good faith basis for the filing by the plaintiffs of a motion for sanctions.

The court confirmed with counsel for Barden that, when he made the settlement offer of $900.37 on January 16, the offer was made solely on behalf of Barden. The court then turned to plaintiffs' counsel and made the point that if the cases were to proceed further, what was at issue would only be the $900.37 and defendants in the various actions would be jointly liable for that amount were the plaintiffs to prevail. At that point, plaintiffs' counsel stated that he had not previously understood that the offer of $900.37 was from just Barden and if the offer was from just Barden, then the plaintiffs were willing to accept it. There then followed a discussion between the court and counsel for Barden during which counsel for Barden argued that if the plaintiffs had recovered $900.37 from any defendant in any case, then the plaintiffs no longer had any claim in this case, and the court expressed a concern about having an adequate basis for making a finding that what had been obtained by the plaintiffs pursuant to the settlements in other cases included the $900.37 for water usage fees.

Counsel for Barden then offered a payment of $900.37 on behalf of Barden, Winsted, Howard and Mattatuck, and it was clear that the amount being offered related only the $900.37 in water usage fees. At that point, the court stated that the cases as to Barden

and the three companies with which it was conducting a joint defense would be dismissed.

Counsel for Howmet Corp.-Turbine Components Corp. and Westvaco then noted that because the plaintiffs had been made whole as to their only remaining claims against those companies, the cases[1] against her clients should be dismissed because they were now moot. The following exchange occurred between the court and plaintiffs' counsel:

> MR. UMEUGO: Your Honor, the one that settled was against four defendants. This particular defendant was not represented in part of the original four that resolved the matter. It's between this plaintiff and the other defendants.
>
> THE COURT: Well --
>
> MR. UMEUGO: To see how they are going to benefit from --
>
> THE COURT: Let me ask you this question, which is prompted by Attorney Whitney's comments: It was my understanding that when we had the settlement with respect to the other first four defendants with Mr. Wellington's clients that the $900.37 was the water usage fees. That's what it represented?
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> MR. UMEUGO: I don't know, Your Honor.

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[1] Bello v. Jarvis Airfoil, 3:01cv01671, and Bello v. Grodel's, 3:01cv01925, respectively.

(Id. at 15, ll. 4-18.) The court could not credit the statement by plaintiffs' counsel that he did not know that the $900.37 offered on behalf of Barden, Winsted, Howard and Mattatuck was for the water usage fees; plaintiffs' counsel provided no other explanation for his refusal to agree at that point that the other cases were moot. It was only after the court made it clear that it had concluded the other cases were moot that plaintiffs' counsel agreed to go along with this outcome. It was apparent from his performance during the course of the January 24 status conference that had plaintiffs' counsel been allowed to do so, he would have attempted to extract at least the $900.37 for the water usage fees from each of the defendants remaining in the other cases he had filed.

The January 24, 2002 conference ended with the court dismissing the claims against the remaining defendants named in all of the related actions.

II. Discussion

Barden has moved (i) for imposition of sanctions against the plaintiffs and their counsel, Attorney Ikechukwu Umeugo, pursuant to the court's inherent power to impose sanctions for improper conduct during the course of litigation, and (ii) in the alternative, for imposition of sanctions against plaintiffs counsel pursuant to Rule 11(b) of the Federal Rules of Civil Procedure, Local Rule of Civil Procedure 16(g)(1)(formerly Local Rule of Civil Procedure 31(a)) and/or 28 U.S.C. § 1927.

When there is bad-faith conduct during the course of litigation that could be adequately sanctioned under either a statute or a procedural rule, the court should

ordinarily rely on the statute or rule rather than on its inherent power. Chambers v. Nasco, Inc., 501 U.S. 32, 50 (1991). However, where conduct that is otherwise sanctionable under a statute and/or one or more procedural rules is intertwined with conduct that can only be reached by means of the court's inherent power, the court may, in its discretion, rely on its inherent power to impose sanctions for the entire course of conduct. See id. at 51. Likewise, when a court would be required to rely upon several different authorities to reach individual actions within a course of badfaith conduct, it may rely upon its inherent power to reach all the actions constituting that bad-faith conduct. See id. at 51 ("In circumstances such as these in which all of the litigant's conduct is deemed sanctionable, requiring a court first to apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the Rules themselves.").

Here, because of the limitations on who may be sanctioned as well as what type of conduct is sanctionable under Rule 11 of the Federal Rules of Civil Procedure,[2] Local Rule of Civil Procedure

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[2] Under Rule 11, the court may only impose sanctions for conduct relating to the signing and filing of papers with the court. The plaintiffs did not sign any of the papers filed in this case. Also, monetary sanctions may not be imposed on a represented party for violation of Rule 11 (b)(2). See Fed. R. Civ. P. 11 (c)(2)(A).

16(g)(1)[3] and 28 U.S.C. § 1927,[4] and because the court has concluded that the imposition of sanctions against both the plaintiffs and their counsel is appropriate, the court has concluded it is most appropriate to impose sanctions pursuant to its inherent power.

The court has inherent power to sanction the improper conduct of both attorneys and their clients. Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986). This inherent power may be used to reach the conduct of a client when that client acts in concert with his or its attorney to carry out an improper course of conduct. See generally Chambers, 501 U.S. at 32-58 (client assessed attorneys' fees and costs for the entire litigation and his attorneys were disbarred or suspended).

A sanction may be imposed under the court's inherent power either for "commencing or for continuing an action in bad faith, vexatiously, wantonly, or for oppressive reasons." Oliveri, 803 F.2d at 1272. A particularized finding of bad faith is required before a court can impose sanctions pursuant to its inherent power. See United States v.

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[3] Local Rule of Civil Procedure 16 (g)(1) provides that the court may impose sanctions "directly against counsel who . . . intentionally obstruct the effective and efficient administration of justice." D. Conn. L. Civ. R. 16 (g)(1). Thus, this local rule does not provide for the imposition of sanctions against the plaintiffs.

[4] Section 1927 provides that any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C.A. § 1927 (2005). Thus, § 1927 also does not provide for the imposition of sanctions against the plaintiffs.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, 948 F.2d 1338, 1345 (2d Cir. 1991) (requiring clear evidence that the challenged actions are entirely without color, that they are taken for reasons of harassment, delay or other improper purpose and requiring a high degree of specificity in the factual findings). In reaching its conclusions, the court may take into consideration related bad-faith conduct engaged in prior to the commencement of the litigation. Sussman v. Bank of Israel, 56 F.3d 450, 459 (2d Cir. 1995) ("While Rule 11 extends only to papers filed with the court, the court's inherent power is broader and would permit the court to impose sanctions on the basis of related bad-faith conduct prior to the commencement of the litigation."). In determining whether there is an overall pattern of bad-faith conduct, the court may also take judicial notice of similar actions filed in other courts. See Elster v. Alexander, 122 F.R.D. 593, 602-05 (N.D. Georgia 1988).

Here, the court concludes that plaintiffs' counsel should be sanctioned for commencing and continuing an action in bad faith, vexatiously, wantonly and for oppressive reasons. The court has concluded that plaintiffs' counsel pursued the action against Barden, and the companies with which it conducted a joint defense, as part of a course of conduct calculated to harass defendants in the lawsuits he filed in federal court into settlement for the nuisance value of the litigation rather than incurring the full costs of a defense, as opposed to entering into settlements as a means to resolve an honest dispute. The court has reached this conclusion as to plaintiffs' counsel for a combination of reasons, discussed below.

First, plaintiffs' counsel knew from his experience with the cases filed in Connecticut Superior Court that the claims the plaintiffs made in state court, and then reasserted in federal court, were ones that most likely could be consolidated into a single lawsuit. There had been a motion to consolidate the seven separate actions filed in Connecticut Superior Court once the cases were transferred to the complex litigation docket. Notwithstanding the fact that plaintiffs' counsel knew that the claims against all the defendants in the lawsuits could be brought in one lawsuit, he incurred on behalf of the plaintiffs the substantial expense of paying numerous separate filing fees.

When Barden pointed to the filing of separate lawsuits as evidence of improper motivation on the part of the plaintiffs and their counsel, plaintiffs' counsel responded in part that "it was due to the fact that some defendants with lower volumes may have been disadvantaged by being classed with defendants with larger volumes of hazardous waste and/or waste materials." (Pls.' Opp'n (Doc. No. 55) at 16.) However, the pattern of filings does not reflect any such attempt to avoid what the plaintiffs seek to characterize as a disadvantage to defendants.

Howard was one of four defendants named in Case No. 3:01CV01665. The volumes attributed to Howard was 66,186 gallons, but the volume attributed to defendants in that case ranged from 54,277 to 66,700 gallons. The plaintiffs alleged that Mattatuck was responsible for 63,040 gallons, but Mattatuck was not included in the same lawsuit as Howard; rather it was named in Case No. 3:01CV01673.

Mattatuck was one of five defendants named in the lawsuit filed against it. The volumes attributed to those defendants ranged from 61,160 gallons to 81,366 gallons. Thus, the plaintiffs attributed to defendants named in the two lawsuits in which Howard and Mattatuck were named defendants volumes that ranged from 54,277 gallons to 81,366 gallons. There were at least five additional defendants the plaintiffs contended were responsible for volumes of hazardous waste and/or waste materials that fell within this range. One, Hartford Compressors (78,984 gallons), was named in the same lawsuit as Mattatuck. The other four were named in four different lawsuits: (i) Case No. 3:01CV01669, naming Tank Service (57,590 gallons); (ii) Case No. 3:01cv1540, naming Main Brothers Oil Company (72,876 gallons); (iii) Case No. 3:01CV01535, naming Southern New England Telephone Company (61,221 gallons); (iv) Case No. 3:01CV01533, naming FM Precision Golf Manufacturing Corporation (56,855 gallons).

Looking at Winsted, which was named as the defendant in Case No. 3:01CV01541, the plaintiffs alleged that it was responsible for 142,699 gallons of hazardous waste and/or waste materials. However, Sandvik Milford Corporation was responsible for 158,875 gallons, and it was named a defendant in Case No. 3:01CV01536.

Then as to Barden, the plaintiffs alleged that Barden was responsible for 587,668 gallons of hazardous waste and/or waste materials, but it was named in a separate complaint from Kanthal Corporation (552,362 gallons), which was named a defendant in Case No. 3:01CV01539.

Thus it is apparent that there was no attempt made by plaintiffs' counsel to group defendants based on the volume of hazardous waste and/or waste materials the plaintiffs contended defendants were responsible for.

Second, plaintiffs' counsel knew, by virtue of the requests to revise that were filed in Connecticut Superior Court, that his claims for negligence and common law intentional and/or reckless conduct were seriously deficient because they failed to allege any duty of care that any of the defendants in the Palladin Group owed the plaintiffs with regard to the management of waste materials at the property. He knew this because he was nonsuited not only with respect to the defendants in the Palladin Group but as to a total of 30 defendants who had filed requests to revise. Yet when plaintiffs' counsel filed the complaint against Barden (and the complaints against all the other defendants in the federal lawsuits), he included, as the Second Count, the same claim for common law intentional and/or reckless conduct with the same deficiency in terms of a failure to allege any duty of care that Barden (or any of the defendants named in the federal lawsuits) owed the plaintiffs with regard to the management of waste materials at the property. Even after this deficiency was pointed out to him repeatedly by virtue of Barden's motion to dismiss, by virtue of the discussion at the October 24, 2001 status conference to discuss Barden's pending motion to dismiss, and by virtue of the court's ruling on Barden's motion to dismiss, plaintiffs' counsel persisted in using the possibility that the plaintiffs might pursue this claim further as leverage in his negotiations with defendants in the lawsuits filed in this court, all the

while never articulating a theory as to why the claim was not frivolous.

Third, the complaints filed in Connecticut Superior Court included a claim for amounts to pay for release of the EPA lien in the amount of $1,134,000. Plaintiffs' counsel was familiar enough with CERCLA to know that Barden and the other "Settling Defendants" were protected, pursuant to CERCLA § 113 (f)(2), from contribution for matters addressed in their settlement with the EPA. Thus he did not include a claim for contribution in the complaints filed in federal court. However, even assuming arguendo that plaintiffs' counsel was initially unaware of the controlling precedent that made the two CERCLA claims set forth in the First Count of the complaint against Barden ones that failed to state a claim, as of the time plaintiffs' counsel received Barden's motion to dismiss, and the other motions to dismiss that were filed in the related cases in this court, he was fully apprised of the law that governed his claims and made them clearly lacking in merit. Certainly, by the time plaintiffs' counsel received the court's ruling on Barden's motion to dismiss, it was clear to him that the claim for $900.37 for water usage fees which had not been originally asserted in any of the complaints he filed in federal court was the only CERCLA claim not clearly lacking in merit. However, he persisted, until the day the court dismissed all the plaintiffs' federal lawsuits, in maintaining the posture that he was settling with defendants to eliminate their exposure to the CERCLA claims and what he knew was a meritless claim for common law intentional and/or reckless conduct.

Fourth, plaintiffs' counsel represented to the court at the January 16, 2002 status conference that a

motion for reconsideration was being considered "very seriously." When the court pressed plaintiffs' counsel as to what possible grounds there could be for a motion for reconsideration, his response was evasive. Plaintiffs' counsel never identified any good faith basis for the filing of a motion for reconsideration, and the court concludes that plaintiffs' counsel was at that point simply posturing in order to keep alive the threat of continued litigation as leverage in settlement negotiations with defendants in the lawsuits he had filed in federal court.

Fifth, at the January 16, 2002 status conference, just prior to the point in time when the court met with plaintiffs' counsel and Bello at the sidebar, counsel for Barden offered payment of the full $900.37 that was the subject of the claim for water usage fees in order to obviate the need for further work on the case. The court then met at the sidebar with plaintiffs' counsel and Bello; the court pointed out that they would have to give the court a good argument as to why it was not sanctionable conduct for them to continue to litigate the cases and drive up expenses for defendants when they were trying to collect the same $900.37 from all the defendants who were left. The court advised them that plaintiffs' counsel ought to do some research and also made the point that unless plaintiffs' counsel had a very good argument on a motion for reconsideration, a sanctions award by the court could exceed the amount paid by defendants who had settled.

Plaintiffs' counsel then made it clear that his strategy was to use as leverage against each defendant the expense of litigating to the end the $900.37 claim for water usage fees. At that point, the court informed plaintiffs' counsel that it was "his call" but that there

was exposure to a motion for sanctions; and the court also reminded plaintiffs' counsel that if he did not handle the situation correctly, all the money that had been received pursuant to settlements so far could be "wiped out by a sanctions award". (Tr. of End of 1/16/05 Status Conf. at 11-12.) Thus, this exchange included an explicit statement by plaintiffs' counsel that he was planning to use the nuisance value of continued litigation as leverage in his settlement negotiations, and an explicit warning by the court to plaintiffs' counsel and Bello that there was exposure to sanctions if such a course of conduct was pursued unless plaintiffs' counsel presented a very good argument in a motion for reconsideration of the court's ruling granting the motion to dismiss.

As stated above, plaintiffs' counsel never filed any motion for reconsideration and never articulated at any time, even in opposition to the motions for sanctions, a good faith basis for filing a motion for reconsideration.

Then, on January 22, 2002, plaintiffs' counsel followed through on the plan he had articulated at the sidebar on January 16, making settlement offers to each of Barden and Winsted and seeking to obtain from each of them $900.37 for water usage fees and $2,000 for attorneys' fees and costs.

Sixth, the response of plaintiffs' counsel at the January 24, 2002 status conference, when the court inquired as to whether he had received a copy of Barden's notice of intent to seek sanctions, was also telling. Plaintiffs' counsel immediately responded that the plaintiffs would also seek sanctions and costs against Barden and Barden's counsel and the

"defendants in question before the Court today." (Tr. of 1/24/04 Status Conf. at 4, ll. 20-23.) This statement by plaintiffs' counsel was clearly made in bad faith, as there was no possible basis for the filing by the plaintiffs of a motion for sanctions. In addition, this statement by plaintiffs' counsel was an indication of the degree of willfulness with which he was proceeding. Having been cautioned by the court at the previous conference about being exposed to sanctions, plaintiffs' counsel chose not to discontinue his unreasonable tactics. Instead, he decided to deter the filing by Barden of a motion for sanctions by threatening Barden and its counsel with the prospect of a clearly frivolous counter-motion, which, obviously, would have resulted in further litigation expense to Barden.

Seventh, the conduct of plaintiffs' counsel at the hearing on January 24, 2002 demonstrated that he was trying to use the fact that he had filed separate lawsuits against defendants to collect the $900.37 for water usage fees, which was the total they owed jointly, from each of them separately. His comment that he was willing to accept $900.37 if the offer was just from Barden, as opposed to Barden, Winsted, Howard, and Mattatuck, reflected this fact. His response to the point made by counsel for Howmet Corp. - Turbine Components Corp. and Westvaco, i.e. that they should not benefit from the payment by other defendants of the $900.37 in water usage fees, also reflected this fact. Finally, his subsequent untrue representation to the court that he did not know whether the $900.37 offered by Barden's counsel was for the water usage fees showed that it was the goal of plaintiffs' counsel to the very end of the case to use

whatever means he could to extract from multiple defendants payment for the same claim.

Looking at this combination of factors, the court concludes that plaintiffs' counsel had as his objective harassing Barden and the other defendants in the lawsuits filed in this court into settlement for the nuisance value of the litigation, and thus acted in bad faith.

As to Bello, the court concludes that he should be sanctioned for continuing an action in bad faith, vexatiously, wantonly and for oppressive reasons with respect to all periods after the court's discussion at sidebar with Bello and plaintiffs' counsel on January 16, 2002.

Bello is a general partner in Vera Associates. Thus, he acted on behalf of both himself and Vera Associates in this action. It is difficult to discern what Bello's motivations were and what he thought was going on in the various cases in the state and federal courts prior to the sidebar conference the court held with Bello and plaintiffs' counsel on January 16, 2002. It is not clear to what extent, if at all, Bello was involved in developing and/or approving the litigation strategy prior to that time, and it is also unclear to what extent plaintiffs' counsel consulted with Bello prior to making decisions. The court observed that when plaintiffs' counsel rejected Barden's settlement offer of $900.37 on January 16, 2002, declaring it unacceptable, he did so without consulting with his client, who was seated in the courtroom at the time.

However, as of the time the court concluded the sidebar discussion with Bello and plaintiffs' counsel on

January 16, 2002, the conduct of plaintiffs' counsel had been described to Bello as driving up expenses for all the defendants when the plaintiffs were trying to collect from all of them the same $900.37 and Barden had just offered to pay the $900.37. Furthermore, Bello heard the court state that the plaintiffs would have to come up with a good argument as to why their conduct was not sanctionable conduct, and he also heard the court state that the plaintiffs could find themselves in a situation where the amount of money they obtained pursuant to settlements with other defendants was wiped out by sanctions imposed by the court. Also, Bello was informed by the court that he was only entitled to recover what the law allowed him to recover and that his lawyer would have to explain the situation to him.

At this point, Bello should have been concerned about how the plaintiffs could face the possibility of losing all the money they had obtained through settlements as a result of a motion for sanctions. Instead, however, when Bello was asked whether he had any questions, the only point made by Bello was that he wanted a judgment for all the court costs he had incurred and for all the damage that had been done to his property and equipment.

At the conclusion of the discussion at sidebar, Bello had to understand that the plaintiffs were suing multiple defendants in multiple actions for a grand total of $900.37 and requiring those defendants to incur attorneys' fees to litigate the cases, as opposed to simply accepting Barden's offer of $900.37. Whether or not Bello sat down and got a detailed explanation from plaintiffs' counsel, the plaintiffs were aware, by virtue of the fact that the court informed Bello that

substantial sanctions could be imposed, that the tactics being used by plaintiffs' counsel were highly questionable. Notwithstanding these facts, Bello permitted plaintiffs' counsel to continue, on behalf of the plaintiffs, harassing defendants in the lawsuits filed in this court into settlement based on the nuisance value of the litigations. That the plaintiffs did nothing to reign their counsel in was evidenced by the conduct of plaintiffs' counsel at the January 24, 2002 status conference.

III. Conclusion

For the reasons set forth above, Barden Corporation's Motion for the Imposition of Sanctions on Attorney Ikechukwu Umeugo and on the Plaintiffs for Bad Faith Litigation Conduct (Doc. No. 40) is hereby GRANTED. Barden shall file an application for attorney's fees and costs, which shall identify which portion was incurred after the court's January 16, 2002 discussion at sidebar with Bello and plaintiffs' counsel. Thereafter, the plaintiffs and plaintiffs' counsel shall have 21 days in which to file any objections to Barden's application.

It is so ordered.

Dated this 29th day of September 2006 at Hartford, Connecticut.

/s/AWT
Alvin W. Thompson
United States District Judge